KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

STEVEN A. AUGUSTINO
DIRECT LINE: (202) 955-9608
EMAIL: saugustino@kelleydrye.com

November 11, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, WC Docket No. 04-313

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice of a November 9, 2004 *ex parte* meeting with Matthew Brill, Senior Legal Advisor to Commissioner Abernathy, in the proceeding identified above. In attendance on behalf of the Loop and Transport CLEC Coalition were: James Falvey, Xspedius Management Company LLC; Russell Merbeth, Eschelon Telecom, Inc.; Jake Jennings, NewSouth Communications, Inc.; Christopher McKee, XO Communications, Inc.; and Brad Mutschelknaus and Steven Augustino of Kelley Drye & Warren LLP.

The CLECs discussed the legal issues raised by the remand in *USTA II*. The attached handouts summarize the matters discussed.

This notice is being filed electronically through the Commission's ECFS system.

Sincerely,

Steven A. Augustino

SAA:pab

DC01/AUGUS/228950.1

Summary of Loop and Transport CLEC Coalition Declarations

Self-Deployment Threshold (Loops)

- KMC: minimum of 3 DS3s needed. (KMC/Duke ¶ 11)
- XO: minimum 3 DS3s required. (XO/Tirado ¶ 9)
- Xspedius: minimum of 3 DS3s needed. (Xspedius/Falvey ¶ 25)
- Eschelon: deployment for a single DS1 or DS3 is never justifiable. (Eschelon/Kunde ¶ 17)
- ATI: has not constructed a building lateral in over 3 years. (ATI/Wigger ¶ 18)
- SNiP: not likely ever to be able to deploy loops. (SNiP/Abate ¶ 9)

Self-Deployment Threshold (Transport)

- XO: minimum of 9-12 DS3s needed. (XO/Tirado ¶ 35)
- ATI: minimum 15 DS3s needed. (ATI/Wigger ¶ 36)
- Broadview: minimum 3 DS3s; took 3 years to reach capacity level for deployment. (Broadview/Sommi ¶ 6)
- SNiP: minimum of OC-12 capacity needed. (SNiP/Abate ¶ 10)

Special Access

- ATI: 95% of DS1 circuits ordered as UNEs. (ATI/Wigger ¶ 52)
- Talk: 100% of DS1 circuits and 90% of DS3 circuits are purchased as UNEs. (Talk/Brasselle ¶ 15)
- XO: More than 75% of DS1s are purchased as UNEs; 77% of DS3s are purchased as UNEs. (XO/Tirado ¶ 44)
- Xspedius: in areas where special access is not priced at UNE rate, 77% of DS1s are ordered as UNEs. (Xspedius/Falvey ¶ 36)

Competitive Alternatives (Loops)

- ATI: has deployed fiber to only 17 buildings. (ATI/Wigger ¶ 9)
- XO: fiber rings connect to less than 1% of the potential buildings in its markets. (XO/Tirado ¶ 16)
- Xspedius: has connected only 600 buildings across 20 states. (Xspedius/Falvey ¶ 20)
- XO: CLECs offer wholesale loops to less than 5% of the buildings XO seeks to serve. (XO/Tirado ¶ 21)

Competitive Alternatives (Transport)

- ATI: 1 transport alternative on 20% of ATI routes; multiple alternatives on only 5-10% of routes. (ATI/Wigger ¶ 45)
- Broadview: Non-ILEC provider is available on only 25% of its routes. (Broadview/Sommi ¶ 8)
- Eschelon: multiple alternative providers available on less than 20% of routes. (Eschelon/Kunde ¶¶ 6, 9)
- Talk America: Multiple providers present on 35% of its routes. (Talk/Brasselle ¶ 9-10)
- SNiP: Transport vendors offered service on only a few routes in 4th largest MSA. (SNiP/Abate ¶¶ 18-19)

- **CLEC reliance on DS1 UNEs**
- Local loop costs are 54-93% of the direct cost of serving a DS1 customer. (XO/Tirado ¶ 43)
- ATI: 70% of new customers obtain DS1 service. (ATI/Wigger ¶ 7)
- KMC: Since 2001, virtually all of KMC's new customers obtain DS1 or above service. (KMC/Duke ¶ 12)
- SNiP: Over 50% of SNiP LiNK's customer base receives integrated T-1 service. (SNiP/Abate ¶ 6)
- XO: Approximately 80% of XO customer loops are at the DS1 level. (XO/Tirado ¶ 5)
- Xspedius: The vast majority of Xspedius' 23,000 customers use DS1s. (Xspedius/Falvey ¶ 9)

The RBOC UNE "Fact" Report
Is Truly Fiction – "Garbage in, Garbage Out"

Self-Deployment of Loops

- Huber claims that CLECs provide 88 million VGE (Huber Report p. I-9), **BUT**
- FCC statistics show only 25 million non-resale VGEs, of which only 6.9 million are over CLEC-owned facilities. Local Competition Stats, 12/31/03.
- Excluding cable company loops, CLECs provide 3.6 million VGEs over their own lines. 1.98% of the total switched access lines in the country.
- Huber Report substantially overstates CLEC VGEs. Compare XO (16.7 million VGEs (Huber) vs. 1.1 million (FCC 477)); Allegiance (1.4 million (Huber) vs. 0.5 million (FCC 477)); Xspedius (3.4 million (Huber) vs. 1.7 million (FCC 477)); KMC (6.7 million (Huber) vs. 0.3 million (FCC 477)).

Deployment of Fiber to Buildings

- Huber claims that CLECs serve fewer than 32,000 buildings with their own fiber (Huber Report p. III-4), **BUT**
- Figure double counts buildings where multiple CLECs have deployed to the same location.
- Even accepting the double counting, figure represents less than 5% of the commercial office buildings in the U.S. *See* TRO fn. 856.
- Fiber wholesalers reach only 3,000 buildings, far less than 1% of commercial office buildings. (Hber Report p. III-5).
- FCC statistics show that CLECs use ILEC UNEs to reach 61% of loops served. Local Competition Stats, Table 3.
- Huber Report admits CLECs use ILEC facilities to connect to 210,000 buildings, by far the vast majority. (Huber Report p. III-3).

Fiber Based Collocation

- Only 16 percent of wire centers have one or more fiber –based collocations. (Huber Report p. III-7 & III-28).
- Approximately half of RBOC wire centers lack any fiber-based collocators. *Id.*
- Per the Huber Report, 9% of wire centers have 2 or more collocators, 6% have 3 or more, 4% have 4 or more, 3% have 5 or more. Huber Report Tables 4 & 10.
- BellSouth data show that 95% of its wire centers with 25,000 or fewer business lines have 3 or fewer collocators. 88% have 0 or 1 collocator. Padgett Ex. SWP-1.
- Line density alone is a poor predictor of fiber based collocation. Line density predicts only 59% of the variance in the number of collocators at a central office. Ford/Pelcovitz Reply Study.

Special Access Use

- RBOCs claim that CLECs use special access for over 90% of DS1s and DS3s. Verizon Comments at 59, **BUT**
- CLECs dispute this data. See Loop and Transport CLEC Coalition Comments.
- Local loop costs are 54-93% of the direct cost of serving a DS1 customer. (XO/Tirado ¶ 43)
- For a typical $1,000 per month business customer of a wireline CLEC DS1 service, the UNE loop and transport cost would leap from $200 per month to $550 per month if special access were substituted for UNEs. Mayo/MiCRA/Bates-White Analysis, ¶ 107.

DE MINIMUS COMPETITIVE MARKET ENTRY DOES NOT FORECLOSE A NATIONWIDE IMPAIRMENT FINDING

- *USTA I* questioned market-wide impairment findings only where the element in question is "significantly deployed on a competitive basis" even if not "ubiquitous"
- A nationwide finding of impairment for DSO loops has been allowed to stand
- *USTA II* did not even criticize the nationwide finding of impairment for high capacity loops, despite the fact that it was clear in the record that competitive loops were available in rare instances
- *USTA II* acknowledged the "inevitability of *some* over- and under- inclusiveness" in the Commission's unbundling rules, and that the Commission can proceed by "broad national categories" where:
  - (i) there is the evidence indicates that markets do not "vary decisively (by reference to its impairment criteria)"; OR
  - (ii) it explores the "possibility of more nuanced alternatives and reasonably reject[s] them"; OR
  - (iii) provided that the nationwide rule is rational, an otherwise impermissibly broad rule can be cured by a "safety valve" waiver or exception procedure
- *USTA II* makes clear that the Commission is free to "take into account such factors as administrability", presumably such as the canvassing of millions of individual commercial buildings
- Conclusion: If the costs to the Commission and affected parties of a granular inquiry exceed the benefit of "getting it right" in all cases, then the Commission may balance the competing factors in favor of a nationwide impairment finding

ENTERPRISE LOOPS

- *USTA II* did not vacate the Commission's nationwide impairment finding for DS1 loops

- The nationwide finding of impairment for DS1, DS3 and dark fiber loops must be reaffirmed

INTEROFFICE TRANSPORT

- CLECs always are impaired without access to unbundled DS1 transport
- CLECs are impaired without access to unbundled DS3 and dark fiber transport unless their aggregate traffic on a route exceeds @12 DS3s of traffic, *or* there are multiple competitive suppliers of transport available on a particular route

RECOMMENDED TESTS FOR DETERMINING WHETHER ADEQUATE COMPETITIVE SUPPLY EXISTS ON A PARTICULAR ROUTE

Tier One: Non-Impairment where:

- Top 50 MSAs; and
- Routes with wire centers serving 50,000 business lines on both ends; and
- At least 4 fiber-based collocators

Tier two: Impairment where:

- All routes with a wire center on either end serving fewer than 25,000 business lines

Tier three: For all other routes, impairment exists unless:

- At least 5 fiber based collocators with active collocations at both ends of the route; and
- At least 2 such collocators self certify that they provide wholesale transport service on the route

A WHOLESALE TRIGGER IS SIMPLE TO ADMINISTER

- Minor additions to annual CLEC Form 477 reporting requirement
- CLECs with wholesale products are motivated by self-interest to report routes with competitive supply